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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1993 TERM

RECORD NO. _____

DAVID H. JENKIN,

Appellant

v.

ELECTRO-TEC CORPORATION,

Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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56 pp

QUESTIONS PRESENTED

I. In an age discrimination case, given that the eleven circuits have created at least eight different tests to determine whether a plaintiff has made a *prima facie* case under McDonnell-Douglas in a reduction in force situation, what are the elements necessary for a plaintiff to establish a *prima facie* case under McDonnell-Douglas in a reduction in force situation?

II. In this age discrimination case, was it appropriate for the court to dismiss Jenkin's age discrimination claim on summary judgment where the evidence presented was sufficient to support a finding that age was a determining factor in the decision to terminate Jenkin's employment?

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REFERENCE TO OPINIONS OF OTHER COURTS IN THIS CASE

David H. Jenkin v. Electro-Tec Corporation, United States District Court for the Western District of Virginia, Roanoke Division, Judge Jackson L. Kiser presiding, Judgment entered April 6, 1993 (Memorandum Opinion - April 19, 1993), docket number 92-0322-R.

David H. Jenkin v. Electro-Tec Corporation, Fourth Circuit Court of Appeals, Judgment affirmed on January 26, 1994, Petition for Rehearing denied February 22, 1994, docket number 93-1553.

JURISDICTION

1. The mandate issued by the Fourth Circuit Court of Appeals states that that Court's judgment order of January 26, 1994 took effect March 1, 1994.

2. The Petition for Rehearing was denied by order dated February 22, 1994.

3. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254 and Rule 10 of the Rules of the Supreme Court of the United States.

4. The district court had subject matter jurisdiction over this action pursuant to the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. §621, *et seq*.

5. The Fourth Circuit Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The text of the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq., is not at issue in this case.

STATEMENT OF THE CASE

Introduction

Working conditions for older workers at Electro-Tec changed markedly after Kaydon, a Florida conglomerate, acquired the Company in June, 1989. Shortly thereafter, Kaydon began to get rid of Electro-Tec's older workers. From September, 1989 through May, 1990, Kaydon/Electro-Tec fired or "involuntarily retired" six of Electro-Tec's older workers. Every one was over 40 years of age, and half, including Dave Jenkin, were over 50.

Prior to the time Kaydon acquired Electro-Tec, Harold D. Hankins was employed as president and general manager of Electro-Tec. Shortly after Kaydon acquired Electro-Tec, it fired Hankins. He was then 62 years old. According to Glen Wilson, Director of Quality Control,

things changed at Electro-Tec "the day that Harold [Hankins] left."

During Jenkin's tenure, Kaydon/Electro-Tec has had no published, written policy prohibiting discrimination against older workers. According to the equal employment opportunity policy set forth in the Company's Personnel Policy Manual,

> Electro-Tec Corporation believes in the strengths of the individual and prefers to base personnel decisions on objective performance rather than subjective opinions. In keeping with this belief, Electro-Tec Corp. will adhere to the following policy:
>
> 1. Recruit, hire and promote all job classifications without regard to race, color, religion, sex or national origin [no mention of age].
>
> 2. Base decisions on employment so as to further the principle of equal opportunity.
>
> . . .

> 4. Insure that all other personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs will be administered without regard to race, color, religion, sex or national origin.... [no mention of age]

After Kaydon acquired Electro-Tec in June, 1989, vice-president/general manager St.Amour approved the company's revised equal employment opportunity policy. The new policy did not prohibit age discrimination either:

> PURPOSE:
>
> To insure that Electro-Tec Corporation offers equal employment and advancement opportunity to all equally qualified individuals regardless of their race, creed, color, sex or National Origin, and to conform to all applicable laws and regulations.
>
> . . .

4. Insure that all other personnel actions such as compensation benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex or national origin.

As recently as July 31, 1992, Electro-Tec still did not have a written policy prohibiting age discrimination. For example, in one of the company's bi-weekly newspapers, the company's equal employment opportunity policy still did not prohibit age discrimination. That policy was as follows:

> Electro-Tec Corporation maintains Affirmative Action Plans for minorities, women, handicapped persons and veterans, Electro-Tec believes in and practices equal opportunity and affirmative action.

As a point of interest, the inclusion of language prohibiting discrimination against veterans did not occur until after the Department of Labor found in July, 1991, that Electro-Tec had discriminated against Jenkin on account of his status as a veteran or a disabled veteran.

The Plaintiff

Dave Jenkin was born July 18, 1935. He served in the United States Army from 1954 through 1979. He completed his military career as a chief warrant officer. According to his superiors, Jenkin performed his tasks "in an energetic and highly proficient manner."

Upon discharge, Jenkin went to work for Chrysler Defense as a technical writer. He wrote manuals for slip rings and various units on the M1-A1 tank. At the time, Electro-Tec had a contract to develop the slip ring for military use.

While employed by Chrysler Defense, Jenkin visited the Electro-Tec plant in Blacksburg and eventually was hired by Electro-Tec in August, 1980, as the General Foreman of the Large Assembly Area in the Chrysler departments.

According to Jenkin's annual reviews, his performance at Electro-Tec over the years was exemplary. A summary of his overall performance evaluations for the period 1981 through 1990 is as follows:

Year	Rating
1981	33 (Good)
1982	35 (Exceptional)
1983	34 (Exceptional)
1984	4 (Clearly exceeds job requirements)
1985	4 (Clearly exceeds job requirements)
1986	3+(Meets job requirements)
1987	4 (Clearly exceeds job requirements)
1988	4 (Clearly exceeds job requirements)
1989	4 (Clearly exceeds job requirements)
1990	3 (Satisfactory)

In 1989, the year before he was fired, Jenkin's supervisor was Alvin R. Ottinger. According to Ottinger, Jenkin was "an excellent employee who has the skills and desire to make very positive contributions toward this company's continued success." Ottinger described Jenkin as "very competent in his responsibilities," "well versed in our manufacturing environment," and "a key individual from my production planning group."

Electro-Tec fired Jenkin on May 3, 1990. Interestingly, Jenkin received his lowest performance appraisal on May 7, 1990---four days after he had been fired.

Electro-Tec Before and After Acquisition by Kaydon

According to Electro-Tec, no written job description exists with respect to any of the positions ever held by Jenkin.

Moreover, according to defense counsel, Electro-Tec has no written job descriptions or written job qualifications for any of the positions at Electro-Tec.

The company did, however, have a written layoff procedure. The procedure provided that employees would be laid off by seniority within job classifications. The procedure also extended bumping rights to senior employees:

> BUMPING-An employee affected by layoff has the right to displace a similarly classified employee within the department who has less seniority in a lower position or in another job within the company in which the affected employee once had regular status or training, or is <u>eligible</u> to fill [Emphasis in original].

Electro-Tec's written layoff procedure permitted a salaried employee to displace an hourly employee. According to St.Amour, the Company permitted Lee Cochran, who assumed Jenkin's duties after

he was fired, to become an hourly employee shortly after Jenkin left. Electro-Tec also permitted Perry Morehead, who was at one time the chief inspector, a salaried position, to become an hourly employee.

With respect to Jenkin, however, Electro-Tec did not apply the seniority policy by permitting him to become an hourly employee. If offered, Jenkin would have accepted employment elsewhere within the plant as either an hourly or a salaried employee. Such an effort by Electro-Tec would have given real meaning to Electro-Tec's written policy concerning "job security," which provides that

> Electro-Tec Corporation believes that each employee is a tangible asset to the Company and *does everything possible* to maintain the security of each employee's position [Emphasis added].

After Kaydon acquired Electro-Tec, Kaydon began to get rid of Electro-Tec's

older workers. No older worker was safe. Kaydon even fired Harold Hankins, the president of the Company. Hankins was 62 years old. Then Kaydon turned its attention to Angel Robert Garcia. In 1990, Garcia was Vice President and Comptroller of the company and had worked for 23 years for KDI Corporation, Electro-Tec and Kaydon. In a meeting with Jim Hayes, vice president of Kaydon, Hayes told Garcia that he may be intelligent "but that [he] was **too old** to learn the Kaydon system." Garcia was fired February 2, 1990. At the time, he was 57 years old.

Of the six salaried exempt workers Kaydon fired or forced to retire between September, 1989 and May, 1990, every one was over 40 years of age; more than one-half were over 50 years of age.

Other employees also recalled that

Electro-Tec or Kaydon officials often spoke of their desire to get rid of older workers. Lawrence "Rusty" McCoy worked as a supervisor of the large assembly area in the spring of 1990. At a meeting with company officials, including St.Amour and Archie Hale, the Manufacturing Manager, the company officials talked about their desire to get rid of older workers.

Another employee, Michael Etgen, also heard of Electro-Tec's desire to get rid of its older workers. In June, 1990, Etgen was promoted from his position as a buyer to Materials Supervisor. In that capacity, Etgen was present at meetings with Electro-Tec's top management, including St.Amour, Archie Hale, and human resources director Tabby Thomas. The meetings were held specifically to discuss ways to reduce the size of Electro-Tec's work force.

During the course of the discussions, St.Amour and the other company officials tried to find ways to circumvent seniority guidelines and get rid of some of the older workers. With respect to the seniority guidelines, Etgen noted that "[t]he actual direction that some of those conversations took showed me that the guidelines were very flexible."

Etgen noted that the company was apparently willing to do whatever was necessary to get around the seniority guidelines to eliminate certain employees. To that end, there was "occasional jockeying done in job descriptions and departments in order to position an individual somewhere where they would not have to be laid off and position another individual to be laid off."

St.Amour, Thomas and Hale did more than discuss in a general sense their

desire to get rid of older workers; they focused their efforts upon specific older workers, including Bob Anderson, Eloise Hetherington and Chlora Bowyer.

According to company records, in June, 1990, Bob Anderson was 64 years old; Eloise Hetherington was 57; and Chlora Bowyer was 63.

Electro-Tec's efforts to get rid of some of its older workers were highly successful. According to Chlora Bowyer, Electro-Tec told her, when she was just one month shy of 65 years of age, that she could either retire or that she would be laid off.

According to Eloise Hetherington, Electro-Tec told her that she could either leave her job as a salaried non-exempt employee in Quality Control and return to her former department (Production Control) as an hourly worker, or she could retire.

She was further told that if she became an hourly worker, she would lose her sick leave and severance pay. She chose to retire. At the time, she was 59-1/2 years old.

Further detailing of facts is reserved for argument.

ARGUMENT

I. Given that the eleven circuits employ at least eight different tests to determine whether a plaintiff has made out a *prima facie* age discrimination case in a reduction in force situation, the Supreme Court should establish a uniform test to determine whether a plaintiff in an age discrimination case has made a *prima facie* case under McDonnell-Douglas in a reduction in force situation.

This case presents a question not previously addressed by the United States Supreme Court: what test should the trial bar and the courts be using to determine whether an age discrimination plaintiff has established a *prima facie* case under McDonnell-Douglas in a reduction in force situation?

The eleven circuits have wrestled with this question and have established eight different tests. A survey of the law created by the circuits is as follows:

First Circuit

In the First Circuit, the plaintiff must show (1) that he was at least forty years of age, (2) that he met the employer's legitimate job performance expectations, (3) that he experienced adverse employment action, and (4) that the employer did not treat age neutrally

or that younger persons were retained in the same position. Goldman v. First National Bank of Boston, 985 F.2d 1113, 1117 (1st Cir. 1993). *See also* LeBlanc v. Great American Insurance Company, 6 F.3d 836, 842 (1st Cir. 1993), and Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 479 (1st Cir. 1993).

Second Circuit

According to the Second Circuit, the plaintiff must show (1) that he was in the protected age group, (2) that he was qualified for the job, (3) that he was discharged, and (4) that the discharge occurred giving rise to an inference of age discrimination. Montana v. First Federal Savings and Loan of Rochester, 869 F.2d 100, 104 (2nd Cir. 1989).

Third Circuit and Ninth Circuit

In the Third and Ninth Circuits, the

plaintiff must show (1) that he belongs to a protected class, (2) that he was discharged from a job for which he was qualified, and (3) that others not in a protected class were treated more favorably. White v. Westinghouse Elec. Co., 862 F.2d 56, 60 (3d Cir. 1988), Washington v. Garrett, 10 F.3d 1421, 1434 (9th Cir. 1993).

Fourth Circuit

The law in the Fourth Circuit has been particularly developmental. In Mitchell v. Data General Corp., 12 F.3d 1310, 1315 (4th Cir. 1993), the Fourth Circuit held on December 22, 1993 that a *prima facie* case may be established by showing that (1) the employee was protected by the ADEA, (2) he was selected for discharge from a larger group of candidates, (3) he was performing at a

level substantially equivalent to the lowest level of the group retained, and (4) the process of selection produced a residual work force of persons in the group containing some unprotected persons who were performing at a level lower than that at which he was performing, (*citing* Duke v. Uniroyal, Inc., 928 F.2d 1413, 1418 (4th Cir. 1991)).

One month later on January 26, 1994, in an unpublished opinion, the Fourth Circuit applied a different test in Jenkin. In the case at bar, the Fourth Circuit held that to make out a *prima facie* case, the plaintiff must show (1) that he is in the protected age group, (2) that he was discharged, (3) that at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations, and (4) that persons outside the protected age

class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff. Jenkin, *slip op.* at 3.

Fifth, Tenth and Eleventh Circuits

The tests established by the Fifth, Tenth and Eleventh Circuits are similar. In Amburgey v. Corhart Refractories Corp., Inc., 936 F.2d 805, 812 (5th Cir. 1991), the Fifth Circuit held that the plaintiff must show (1) that he is within the protected age group and that he has been adversely affected, for example, discharged or demoted, by the employer's decision, (2) that he was qualified to assume another position at the time of the discharge or demotion, and (3) that he must produce evidence, circumstantial or direct, from which factfinder might

reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

In Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 799-800 (10th Cir. 1993), the Tenth Circuit held that the plaintiff must show (1) that he was within the protected age group, (2) that he was adversely affected by the defendant's employment decision, (3) that he was qualified for the position at issue, and (4) that he must produce evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

In Earley v. Champion Intern Corp., 907 F.2d 1077, 1082 (11th Cir. 1990), the Eleventh Circuit held that the plaintiff must show (1) that he was in a protected

age group and was adversely affected by an employment decision, and (2) that he was qualified for his current position or to assume another position at the time of discharge or demotion, and (3) that he must produce evidence by which a factfinder might reasonably conclude that the employer intended to discriminate on the basis of age in reaching the decision at issue. The Eleventh Circuit noted that where a particular job position is entirely eliminated for non-discriminatory reasons, the plaintiff must show that he was qualified for another available job with that employer; qualification for his current position is not enough.

Sixth Circuit

According to the Sixth Circuit, the plaintiff must show (1) that he was age forty or over, (2) that he was qualified

to perform the job, and (3) that he was discharged. In addition, the evidence must be sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of his age. Barnes v. GenCorp Inc., 896 F.2d 1457, 1465-66 (6th Cir. 1990).

Seventh Circuit

In the Seventh Circuit, the plaintiff must show (1) that he was within the protected age group, (2) that he was performing according to the employer's legitimate expectations, (3) that he was terminated or demoted, and (4) that others not in the protected class were treated more favorably. King v. General Electric Co., 960 F.2d 617, 621 (7th Cir. 1992).

Eighth Circuit

In the Eighth Circuit, the plaintiff

must show (1) that he or she is within a protected age group, (2) that he or she met applicable job qualifications, (3) that despite these qualifications, he or she was discharged, and (4) that, after the discharge, the position remained open, and the employer continued to seek applications from persons with similar qualifications. In a reduction in force situation, some additional showing of discrimination is required to make a *prima facie* case. Kypke v. Burlington Northern Railroad Company, 928 F.2d 285, 286 (8th Cir. 1991).

There is no reason to have different rules of law among the circuits. Uniformity among the circuits would facilitate uniform application of the ADEA across the country.

The Supreme Court has noted that every age case will ultimately turn upon

"inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. _____, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993). With respect to questions of intent, the Fourth Circuit has held that "[q]uestions of intent are quintessentially ones for the factfinder under most circumstances...." Paroline v. Unisys Corp., 879 F.2d 100, 109 (4th Cir. 1989). In light of the inherent difficulties in producing evidence of the corporate employer's intent, and in light of the divergent positions taken by the circuits with respect to the elements of proof, the trial bar and the lower courts need uniform direction from the Supreme Court to determine what is necessary for a

plaintiff in an age discrimination case to make out a *prima facie* case.

II. The lower courts erred by dismissing Jenkin's age discrimination case on summary judgment where direct and circumstantial evidence raised a question of fact concerning whether age was a determining factor in the decision to terminate Jenkin's employment.

The evidence was sufficient to raise a question of fact concerning whether age was a determining factor in the company's decision to terminate Jenkin.

The Search for Evidence of Intent

As stated, this case, and every ADEA case, will ultimately turn upon "inquiry into the elusive factual question of intentional discrimination." Texas Dept.

of Community Affairs v. Burdine, 450 U.S. 248, 255, n.8, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. _____, _____, 113 S.Ct. 2742, 2747, 125 L.E.2d 407 (1993). In the case at bar, the Fourth Circuit held that Jenkin did not meet his ultimate burden of proving that the termination was in fact based upon age.

Was the Fourth Circuit correct? Is there evidence from which a jury could find that Jenkin's age was a determining factor in Electro-Tec's decision to terminate his employment?

Take a look at the evidence. First, the problems for older workers did not begin until Kaydon acquired Electro-Tec in June, 1989. Thereafter, Kaydon began to get rid of Electro-Tec's older managerial and supervisory employees. From September, 1989 through May, 1990, Kaydon

fired or "involuntarily retired" (whatever that means) six older managerial or supervisory employees:

James Pangle	(09/18/89; 66)
Harold Hankins	(01/31/90; 61)
Bob Garcia	(02/02/90; 57)
Alvin Ottinger	(02/07/90; 43)
Glen Wilson	(02/07/90; 47)
Dave Jenkin	(05/04/90; 54)

Kaydon's efforts to get rid of Electro-Tec's older workers slowed to a trickle after Jenkin filed his age discrimination claim with the EEOC in July, 1990. Of the eight salaried exempt employees Kaydon fired between June, 1990 and October, 1992, only three were in the protected class, and both of those employees were relatively young (in their 40's). Such evidence might not be dispositive, but it is certainly probative of Kaydon's intent to get rid of Electro-Tec's older managerial and supervisory employees.

Second, the fact that Kaydon/Electro-Tec had no published, written policy prohibiting age discrimination is probative at a minimum of Kaydon's lack of awareness or regard for the ADEA. It is true that prior to the time Kaydon acquired Electro-Tec, Electro-Tec had an unsigned, undated layoff procedure that provided that employees would be "laid off by seniority within the job classification involved within the department without regard to race, color, religion, sex, age or national origin". Kaydon's formal EEO policy, however, which was signed by vice president and general manager Sam E. St.Amour after Kaydon acquired Electro-Tec, did not prohibit discrimination against older workers.

Third, in terminating Jenkin, the Company ignored its own written bumping rights policy. The Company failed to

apply its written layoff policy to permit Jenkin to "displace a similarly classified employee within the department who has less seniority in a lower position or in another job within the company in which the affected employee once had regular status or training, or is eligible to fill" [Emphasis in original], as required by the layoff policy. The Company did apply the policy to some salaried employees to permit them to retain employment. One of Jenkin's fellow supervisors, who had less seniority than any of the nine supervisors, was allowed to bump a manufacturing engineer to retain employment. Further, the Company permitted Lee Cochran, who assumed Jenkin's duties after he was fired, to later become an hourly employee. In addition, Electro-Tec permitted Perry Morehead, who was at one time the chief

inspector, a salaried position, to become an hourly worker.

The bottom line is that with respect to the written layoff policy, the evidence compels a finding that Kaydon/Electro-Tec applied the policy when it wanted and ignored it at other times.

In a meeting with vice-president St.Amour, employee Mike Etgen learned what former Kaydon executive St.Amour thought of Electro-Tec's written layoff policy. According to Etgen, St.Amour and other company officials met specifically to find ways to get around the seniority guidelines to get rid of the Company's older workers. With respect to the seniority guidelines, Etgen noted that "[t]he actual direction that some of those conversations took showed me that the guidelines were very flexible."

Under the circumstances, a jury may

well conclude that Electro-Tec's failure to apply its written layoff policy to Jenkin is another indicator of age discrimination.

After Kaydon took over the Blacksburg plant, Kaydon sent St.Amour from Florida to run the facility. According to witnesses, St.Amour, Hale and Thomas met to discuss ways to circumvent seniority guidelines and get rid of Electro-Tec's older workers.

As a direct result of the meetings, the company fired or forced at least four hourly workers to retire: Bob Anderson (age 64), Eloise Hetherington (age 57), Chlora Bowyer (age 63), and Bill Holliday (age 57).

Chlora Bowyer, one month shy of 65 years of age, was told that she "could either retire or that [she] would be laid off." In her affidavit, Eloise

Hetherington stated that Electro-Tec told her that she would either be demoted or that she could retire. Specifically, she stated as follows:

> After I had gone to work in quality control, I was told that my job in quality control would be eliminated and that I had two choices. First, I could take a job in my old department (production control) as an hourly worker, in which case I would lose sick leave and severance pay. In the alternative, I was told that I would retire.
>
> Rather than accept the job as an hourly worker and lose my sick leave and severance pay, I chose to retire. At the time, I was 59-1/2 years of age.

The experiences of Bowyer and Hetherington give life to the Company's notion of "involuntary retirement."

St.Amour's efforts are plainly probative of Kaydon's intent to get rid of Electro-Tec's older workers. A jury may well find that former Kaydon executive

St.Amour did whatever he felt necessary to force Electro-Tec's older workers to leave their jobs.

Interestingly, the company has stated that when it discussed getting rid of older workers, it was simply trying to get rid of unproductive workers. This is precisely the type of stereotyping that the ADEA prohibits. In Hazen Paper Co. v. Biggins, 507 U.S. _____, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), Justice O'Connor stated as follows

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age. As we explained in EEOC v. Wyoming, 460 U.S. 226 (1983), Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

Id., 123 L.Ed.2d at 347.

In the case at bar, there is not a scintilla of objective evidence to support a finding that the older workers that the Company fired or "involuntarily retired" were any less productive than younger workers. With particular reference to Jenkin's firing, there is no evidence that Jenkin was any less competent or proficient than the younger supervisors Kaydon chose to keep.

Fourth, after Kaydon acquired Electro-Tec in June, 1989, Kaydon vice president Jim Hayes told Electro-Tec vice president and comptroller Angel Robert Garcia that he may be very intelligent, but he was "too old" to learn the Kaydon system. Hayes' statement is directly probative of Kaydon's discriminatory animus.

Fifth, review of Electro-Tec's

employee data for the years 1989 through 1991 plainly shows that of the 18 persons hired since Kaydon acquired Electro-Tec in June, 1989, not one was over 55 years of age, and only one was over 50 years of age.

Sixth, Jenkin received his lowest performance appraisal on May 7, 1990---four days after the Company had fired him on May 3, 1990. Why would the Company bother to prepare a low performance evaluation of Jenkin four days after he had been fired?

Jenkin respectfully submits that the above-described direct and circumstantial evidence is probative of the Company's intent and effort to get rid of older workers, including Jenkin.

Once a plaintiff makes out a *prima facie* case, it will rarely be appropriate to award summary judgment because the case

will ultimately turn upon "inquiry into the elusive factual question of intentional discrimination." Burdine, 450 U.S. at 255, n.8; St. Mary's, 113 S.Ct. at 2747. Any indication of discriminatory motive may suffice to raise a question that can only be resolved by the trier of fact.

> Once a *prima facie* case is established ...summary judgment for the defendant would ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII [or ADEA] dispute is the 'elusive factual question of intentional discrimination.'

Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985), *citing* Burdine, 450 U.S. 248, 255, n.8, 101 S.Ct. 1089, 67 L.E.2d 207 (1981).

CONCLUSION

In the years that have passed since the passage of the Age Discrimination in

Employment Act, the circuits have developed different tests to determine whether a plaintiff has made out a *prima facie* case in a reduction in force situation. Direction from the Supreme Court is needed to ensure that federal law is uniformly applied in all circuits.

The case at bar and every age case, will ultimately turn upon "inquiry into the elusive factual question of intentional age discrimination." Burdine, 450 U.S. at 255, n.8; St. Mary's, 113 S.Ct. at 2747. The Fourth Circuit has correctly noted that questions of intent are quintessentially ones for the factfinder under most circumstances. Paroline, 879 F.2d at 109.

In the case at bar, there is sufficient evidence, both direct and circumstantial, from which the trier of fact could conclude that age was a

determining factor in the Company's decision to terminate Jenkin. Accordingly, the lower court erred by dismissing Jenkin's claim on summary judgment.

Jenkin respectfully requests (1) establishment of uniform law by the Supreme Court concerning the elements necessary to establish a *prima facie* case in a reduction in force situation, and (2) that the judgment of the Fourth Circuit be reversed, and that this matter be remanded to the district court for trial.

Respectfully submitted,

DAVID H. JENKIN

By J. Michael Gray

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APPENDIX

1. Trial Court Judgment
2. Fourth Circuit Panel Opinion
3. Fourth Circuit Opinion on Rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

David H. Jenkin,	)	
	)	
Plaintiff	)	Civil No. 92-0322-R
	)	
v.	)	Order
	)	
Electro-Tec Corp.	)	By: Hon. Jackson L. Kiser,
	)	
Defendant	)	U.S. District Judge
	)	

For the reasons stated in a Memorandum Opinion which will be filed subsequent to this Order, it is ADJUDGED and ORDERED that:

1. Plaintiff David H. Jenkin's motion to strike the affidavit of Human Resource Director Tabby Thomas and request for Rule 11 sanctions is DENIED.

2. Defendant Electro-Tec Corp.'s motion for summary judgment is GRANTED.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

Entered this 6th day of April, 1993.

/s/ Jackson L. Kiser
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

DAVID H. JENKIN,
Plaintiff-Appellant,

v.

ELECTRO-TEC CORPORATION,
Defendant-Appellee.

No. 93-1553

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Jackson L. Kiser, Chief District Judge.
(CA-92-322-R)

Argued: October 26, 1993

Decided: January 26, 1994

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Terry N. Grimes, KING, FULGHUM, SNEAD, NIXON & GRIMES, P.C., Roanoke, Virginia, for Appellant. Clinton Stephen Morse, WOODS, ROGERS, & HAZLEGROVE, Roanoke, Virginia, for Appellee. **ON BRIEF:** Frank K. Friedman, Todd A. Leeson, WOODS, ROGERS, & HAZLEGROVE, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

David Jenkin appeals from the district court's grant of summary judgment to Electro-Tec Corporation on his claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (hereinafter the ADEA). Finding no error in the court below, we affirm.

"In order to establish a cause of action under the ADEA, a plaintiff must demonstrate that but for the employer's motive to discriminate against the plaintiff on the basis of age, the plaintiff would not have been discharged." *EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992). An ADEA case may be proved in one of two ways: either by "any direct or indirect evidence relevant to and sufficiently probative of the issue ...," *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982); or by using the judicially created scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Appellant in this case has attempted to overcome summary judgment using both methods.

When analyzing a case based on direct evidence without using the *McDonnell Douglas* presumptions, the plaintiff may only prevail if that evidence shows that but for the plaintiff's age, the plaintiff would not have been discharged. *Lovelace*, 681 F.2d at 240; *see Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1705 (1993) (liability under ADEA depends on whether age actually motivated employer's decision). To overcome a motion for summary judgment based upon direct evidence, the plaintiff must produce "direct evidence of a stated purpose to discriminate on the basis of age and/or circumstantial evidence of a stated purpose to discriminate on the basis of age of sufficient probative force to reflect a genuine issue of material fact." *Clay Printing*, 955 F.2d at 941. The district court in a thorough opinion in this case correctly concluded that appellant here produced no such evidence.

The other method of proof for an ADEA case is as follows: first, the plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination; second, the defendant must articulate a legitimate non-discriminatory reason for the adverse employment decision; and finally, the plaintiff must have a chance to prove the articulated reasons are merely a pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). The plaintiff always bears the ultimate burden to prove intentional discrimination. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

To make out a prima facie case of discriminatory termination, a plaintiff must show:

> 1) that he is in the protected age group; 2) that he was discharged; 3) that at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations; and 4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff.

Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th Cir. 1991). In this case, even assuming that appellant made out a prima facie case,[1] he has completely failed to produce any evidence to rebut the employer's articulated non-discriminatory reason. The employer in this case has shown that Jenkin was replaced by Lee Cochran because Cochran was a better employee, and Jenkin has not met his ultimate burden of proving that the termination was in fact based on age.

Appellant has totally failed to establish an issue of material fact that would enable him to meet his burden of proof either under a direct evidence test or under the *McDonnell Douglas* standard.

---

[1]Actually, appellant's direct replacement, Lee Cochran, was also within the protected age class. However, other supervisors were retained who were under forty years of age.

Accordingly, the district court correctly granted summary judgment to Electro-Tec Corporation.[2]

AFFIRMED

[2]In its brief, appellee also raises the argument that appellant is barred from pursuing this action by the doctrine of election of remedies. This argument is based on appellant's previous settlement of a claim of discrimination based on his status as a veteran arising out of these same facts. The district court ruled against appellee on this issue. However, appellee did not note a cross-appeal, and the matter therefore is not properly before this court. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 22, 1994

No. 93-1553
CA-92-322-R

DAVID H. JENKIN

Plaintiff-Appellant

v.

ELECTRO-TEC CORPORATION

Defendant - Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK